

PETER J. ROSATI

IBLA 89-228

Decided May 14, 1991

Appeal from a decision of the Director, Charleston, West Virginia, Field Office, Office of Surface Mining Reclamation and Enforcement, declining to take further Federal action in response to citizen's complaint I&E-MOR-88-077-32.

Affirmed.

1. Surface Mining Control and Reclamation Act of 1977: Approximate Original Contour: Generally--Surface Mining Control and Reclamation Act of 1977: Backfilling and Grading Requirements: Generally--Surface Mining Control and Reclamation Act of 1977: Citizen Complaints: Generally--Surface Mining Control and Reclamation Act of 1977: Enforcement Procedures: Generally--Surface Mining Control and Reclamation Act of 1977: Inspections: Generally

In response to a citizen's complaint charging that an area disturbed by surface coal mining operations has not been restored to its approximate original contour, OSM properly declines to undertake a further inspection of the minesite and enforcement action where it determines that the land has been so restored, and where the appellant presents no evidence to the contrary.

APPEARANCES: Peter J. Rosati, pro se.

OPINION BY ADMINISTRATIVE JUDGE HUGHES

This case was initiated by the filing of a citizen's complaint by Peter J. Rosati on September 13, 1988, pursuant to the Surface Mining Control and Reclamation Act of 1977 (SMCRA), as amended, 30 U.S.C.

§§ 1201-1328 (1988), and 30 CFR 842.12(a). In that complaint, Rosati, who owns land adjacent to the surface coal mine of the Daugherty Coal Company, Inc. (Daugherty), in Preston County, West Virginia, operating under permit No. S-1009-86, objected to Daugherty's reclamation of the mine. Specifically, Rosati contended that Daugherty had failed to restore the disturbed area nearest his fence line to its approximate original contour. Rosati stated that, due to the failure to restore the disturbed area

to its approximate original contour, that area was "in danger of erosion," thus threatening his fence line. ^{1/} Rosati also stated that the disturbed area was washing away a county road.

In response to the citizen's complaint, the Morgantown, West Virginia, Field Office, Office of Surface Mining Reclamation and Enforcement (OSM), issued 10-day notice No. 88-11-433-034 to the State of West Virginia on September 13, 1988, pursuant to section 30 U.S.C. § 1271(a)(1) (1988). OSM notified the State that, based on the complaint, OSM had reason to believe that Daugherty was in violation of law by failing to backfill the disturbed area to its approximate original contour and allowing water from the pond to wash out the area. OSM stated that it would inspect the minesite and take appropriate enforcement action if the State failed either to take appropriate action to cause the violation to be corrected or to show good cause for failure to do so within 10 days of receipt of the notice.

On October 4, 1988, the State replied that it had inspected Daugherty's minesite on September 16, 1988, and had taken appropriate action, as, at that time, no damage had been done to the county road, and backfilling was still being done on the site where approximately 100 feet of road was in question.

On September 26, 1988, OSM inspector William Berthy, accompanied by Rosati and State inspector Michael Parks, inspected the minesite. Berthy reported in an October 3, 1988, "Mine Site Evaluation Inspection Report," that water had flowed off the site onto the county road, eroding the road and filling up the ditch line and the culvert with water and sediment. He noted that Parks issued a citation (NOV's Nos. 21 and 22)) because the water did not meet effluent limitations and because of the lack of drainage control.

We also looked at the area adjacent to Mr. Rosati's property line which he alleges is not back to [approximate original contour]. The company mined to 10 [feet] of Mr. Rosati's property line. The area is not back to the original contour, but the slope from Mr. Rosati's property is approximately a 3:1 slope. The slope length is approximately 100 [feet]. The state inspector stated that the area was backfilled to [approximate original contour]. The company stated that they will do some more work on this area to make a flatter slope. I talked to [State Inspector Parks] on October 2, 1988, and Mr. Rosati on October 3, 1988. Mr. Rosati said that the company had started putting additional material on the slope.

Id. at 3.

^{1/} In a report of a Sept. 19, 1988, telephone conversation with an OSM employee, Rosati is reported as saying that Daugherty's "embankment."

By letter dated October 7, 1988, OSM notified the State that it regarded the action taken by the State in issuing the action in response to the 10-day Notice, noting that, as mentioned in the inspection report, Daugherty was continuing to backfill the disturbed area adjacent to Rosati's property.

OSM apparently re-inspected the site on October 25, 1988. On that date, it notified the State that it had determined that Daugherty had backfilled to approximate original contour along Rosati's fence line. 2/

Rosati was apprised by OSM of its disposition of the State's response to the 10-day notice and was advised that an informal review by the Director, Charleston, West Virginia, Field Office, OSM. Rosati effectively requested such review, contending that Daugherty had failed to restore the disturbed area adjacent to his property to its approximate original contour, the deviation from the original contour exceeded 3 feet. 3/ Rosati stated that he and representatives of the State and OSM had agreed that a buffer area between my fence and the remaining reclaim[ed] area would be put back to * * * near the original contour" (Request for Review at 3). Finally, Rosati stated that he again feared that, in the absence of the restoration of approximate original contour, erosion of the disturbed area would destroy his fence.

On December 23, 1988, the Director of the Charleston, West Virginia, Field Office, OSM, issued a decision, concluding that the State had taken appropriate action concerning Daugherty's restoration of the area disturbed by its surface coal mining operations to its approximate original contour, and that OSM was not required to undertake any further Federal inspection or enforcement action. The Director stated that, on the

October 25, 1988, OSM inspection, that the State had properly determined that Daugherty had backfilled and graded the disturbed area so that the area closely resembles the general surface configuration of the land prior

2/ The record indicates that the determination that the disturbed area adjacent to Rosati's property had been restored to its approximate original contour was made by comparing the original contour of the land to the contour of the land after reclamation along three lines, 100 feet long, run from the fence line across the disturbed area. According to graphs depicting these lines, the deviation, which was measured from the original contour was between 3.42 and 7.8 feet for the first line, 5.04 and 10.37 feet for the second line, and 3.51 and 8.0 feet for the third line. 3/ No mention was made in the request for review of Rosati's objection to the fact that water was running off the minesite. We may presume from this that he was satisfied by the action taken by the State to correct the violations attendant to this problem. As a result of his failure to raise this matter in his request for review, it was not determined in the subsequent decision, which is the basis of the present appeal, and, thus, is not properly before the Board.

to mining and blends into and complements the drainage pattern of the surrounding terrain, with all highwalls and spoil piles in accordance with section 701(2) of SMCRA, 30 U.S.C. § 1291(2) (1988) (Decision at 1). ^{4/} Rosati appealed timely from the Director's Decision.

In his statement of reasons for appeal (SOR), appellant again contends that OSM failed to ensure that the disturbed mine near his fence line was restored to its approximate original contour, as the contour remaining after backfilling and grading was more than 3 feet below the original contour by more than 3 feet. ^{5/}

[1] Throughout the time involved here, the State had primary responsibility for the administration of surface coal mining on non-Federal land in the State. See 46 FR 5915 (Jan. 21, 1981). Under SMCRA, OSM also had oversight responsibility, pursuant to section 521(a)(1) of SMCRA, to inspect an alleged violation of SMCRA where the State failed either to take appropriate action, or to show good cause for failure to do so, within 10 days of receipt of notice from OSM and then to fail to take action. W. E. Carter, 116 IBLA 262, 266-67 (1990); Dora Mining Co., v. OSM, 100 IBLA 300, 302 (1987).

The present case involves an alleged failure by the mine operator to restore the land disturbed by its operations to its approximate original contour. Under the pertinent section of the West Virginia Surface Mining and Reclamation Act, W. Va. Code § 22A-3-12(b)(3) (1988), which was patterned after section 515(b)(3) of SMCRA, 30 U.S.C. § 1215(b)(3), an operator is required to restore any area disturbed by surface coal mining to its approximate original contour.

^{4/} The Director further noted that Daugherty "still has a responsibility during the next appropriate season to prepare the site and surrounding areas from erosion damage" (Decision at 1).

^{5/} We note that in his November 1988 request for review, appellant also asserted for the first time, at page 3, that topsoil was lost near his fence line, presumably in the course of mining, had "never [been] returned." The question of whether this constituted a violation was addressed by the Director in his December 1988 decision. Appellant does not pursue the matter on appeal and we, therefore, do not address it. Further, appellant also suggested in his request for review that Daugherty's mining operation was responsible for a marked decrease in his supply of spring water and for cracks in the foundation of his nearby house, and he has mentioned these matters in his December 1988 decision, the Director recognized these matters, but stated that the water loss problem might have been prevented if appellant had recommended that appellant request OSM to investigate the problem with cracks. Appellant did not present these matters to the Director, and, thus, they were not the subject of OSM's initial investigation. Furthermore, they were not adjudicated by the Director. Accordingly, we decline to consider them at this time.

operations to its "approximate original contour" by means of backfilling, compacting, and grading.

Upon receipt of appellant's citizen's complaint, OSM properly issued a 10-day Notice to the State because, by virtue of the complaint, OSM had reason to believe that Daugherty was violating section 302 of the SMCRA by failing to restore the area disturbed by its surface coal mining operations to its approximate original contour. 30 U.S.C. § 302. See, e.g., Willowbrook Mining Co. v. OSM, 108 IBLA 303, 311-12 (1989), appeal filed, Willowbrook Mining Co. v. Lujan, No. 89-1000, 108 IBLA 303, 311-12 (1989).

The State's immediate response, which was based on its September 16, 1988, inspection of the site, was that Daugherty had not restored the area. No action was required of OSM at that time because the question of whether the land had been properly restored was not resolved at the conclusion of backfilling and grading. See W. E. Carter, supra at 267. Nevertheless, rather than wait for the State's inspection of the relevant area itself, in the company of the State inspector and appellant, on September 26, 1988. While the State regarded the area as restored to its approximate original contour, OSM deferred making any determination, in view of a statement by the company to do more backfilling.

The minesite was inspected again on October 25, 1988, presumably after the conclusion of Daugherty's backfilling and grading. OSM determined that the land had been restored to its approximate original contour. From that point on, no further action was taken.

Thus, the record reveals that OSM actively exercised its oversight responsibility, independently determining whether the area immediately adjacent to appellant's property had been restored to its approximate original contour, after inspecting the site on two occasions. OSM declined to take any further action beyond inspecting the site.

In view of OSM's having exercised its oversight responsibility, the only question to be resolved is whether it properly exercised its discretion under SMCRA and its implementing regulations, that the land had been restored to its approximate original contour and that no inspection or enforcement action was warranted, where the contour following backfilling and grading deviated from the original contour by more than 3 feet.

There is no requirement, either in SMCRA or its implementing regulations, that an area disturbed by surface mining operations be graded so that the resulting contour of the land does not differ from the original contour by more than 3 feet. ^{6/} As the Director pointed out, the SMCRA does not require that the land be restored to its original contour.

^{6/} In his November 1988 request for review, appellant stated that he was informed by unidentified people that approximately 3 feet of the land had been restored to its approximate original contour "within one or two feet of the original contour." Appellant does not state that he was so informed by any employee of OSM.

requirement is that, at the conclusion of backfilling and grading, the disturbed area should "closely resemble the general surface of the land prior to mining and blend into and complement the drainage pattern of the surrounding terrain." 30 U.S.C. § 1291(2)(B). Appellant has not submitted any evidence that this was not achieved in the present case.

We note that, while there was arguably a somewhat significant change in the slope of the mined land immediately adjacent to the fence line, the overall change in the slope across the disturbed area from the fence line was much milder. ^{7/} Nearest the fence line, there was a change in the slope of the land from between 8 and 10.82 percent before mining to between 18.37 and 19.18 percent after mining.

Nevertheless, OSM's conclusion that the disturbed area extending away from appellant's fence line "closely resembles the configuration of the land prior to mining" is consistent with an example posited in SMCRA's legislative history. Figure 6 in H.R. Rep. No. 104, 1st Sess. 104, reprinted in 1977 U.S. Code Cong. & Admin. News 593, 637, depicts what is considered "approximate original contour" after reclamation, as compared to the original contour, in three situations.

It is clear from one of the illustrations, where the original and reclaimed contours of the land are very similar to the present situation, that the original contour was achieved in the present case. As the report further states, Congress did not intend that SMCRA should impose the impossible task of restoration of the contour or the useless act of digging a new pit to obtain fill material to achieve full restoration of the topography." H.R. Rep. No. 218, 95th Cong., 1st Sess. 96, reprinted in 1977 U.S. Code Cong. & Admin. News 593, 633.

Thus, we cannot conclude that Daugherty failed to restore the subject land to its approximate original contour, and that OSM, in implementing regulations, such that, in the absence of appropriate State action, OSM was required to further inspect the land and take enforcement action to ensure that the land was restored to its approximate original contour. Therefore, we conclude that OSM should undertake any further Federal inspection and enforcement action in response to appellant's citizen's complaint. ^{8/}

^{7/} The land immediately adjacent to appellant's land was measured prior to mining as sloping at 9.87:1, 12.5:1, and 9.24:1 (horizontal to vertical). After reclamation, it was measured as sloping at 5.21:1, 5.44:1, and 5.25:1, substantially steeper.

The land from the fence line was measured as sloping at 9.39:1, 13.3:1, and 9.25:1 before mining versus 5.21:1, 5.44:1, and 5.25:1 respectively, after reclamation.

^{8/} Appellant is concerned that erosion will undermine his fence line. However, while the relevant area, as it did before mining, was eroding away from his fence line, there is no evidence that erosion is likely to take place, especially once the land has been reclaimed. H.R. Rep. No. 218, 95th Cong., 1st Sess. 97, reprinted in 1977 U.S. Code Cong. & Admin. News 593, 633.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, the appeal from is affirmed.

David L. Hughes
Administrative Judge

I concur:

Wm. Philip Horton
Chief Administrative Judge

fn. 8 (continued)

Admin. News, 593, 633, Congress, referring to reclamation efforts in West Virginia and Pennsylvania where the results were 32 degrees, reported that "surface erosion has been successfully controlled through establishing adequate revegetation." S. Rep. No. 4, H.R. Rep. No. 218, 95th Cong., 1st Sess. 99-100 (1977). Appellant has offered nothing, beyond his opinion, to prove that erosion "surely will happen" (SOR at 1). As noted above at footnote 4, at the time this appeal arose, OSM stressed Daugherty's responsibility to provide cover which would protect the site and surrounding areas from erosion damage. Appellant has not provided information during the appeal that erosion has occurred.

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